No. 514.

IN THE

Supreme Court of the United States

October Term, 1944.

THOMAS HENRY ROBINSON, JR., - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER.

THOMAS HENRY ROBINSON, JR., *Pro Se*,
Petitioner.

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To the Chief Justice and Associate Justices of the Supreme Court of the United States:

By this supplemental brief petitioner desires to enlarge upon Question 5 (d) of his Petition for Writ of Certiorari, to-wit: "Whether the death penalty was intended to be inflicted regardless of the time when inflicted or the degree of injury inflicted," so this question will be dealt with here.

ARGUMENT.

Time When Injury Inflicted Controls.

Petitioner vigorously contends that, in view of the language of the statute, which must in this criminal case be strictly construed, the intention of Congress considered, and the wording of the indictment under which he was

tried, convicted and sentenced, the death penalty has been illegally imposed upon him.

The indictment charged that while in the custody of petitioner the victim was beaten and injured, and the proof for the Government, without doubt, shows that whatever beating and injuring there was occurred in the victim's home PRIOR to the transportation in interstate commerce. Under federal law, prior-to-transportation, beating and injuring is no offense. At least, it is not an offense under the Lindbergh Act. That Act, it must be remembered, denounces as a crime simply the TRANSPORTATION IN INTERSTATE COMMERCE of a person who has theretofore been kidnaped and held for ramson or reward. The statute not having included PRIOR beating or injuring or the infliction of any injury at the time of the kidnaping as an ELEMENT of the offense of interstate transportation of a kidnaped person, it is beyond question, and is indisputably clear, that the death penalty in this case has been illegally imposed. It is exceedingly doubtful that, in view of the abstract wording of the statute, always to be strictly construed, and in view of the absence from the statute of any wording denoting that beating or injuring prior to transportation is any part of the offense denounced, the death penalty can ever be inflicted upon the mere proof or showing of the commission of acts of violence (or the results of such prior acts) committed upon the person of the victim preceding the actual transportation in interstate commerce. No such intention is or can be gathered from the language of the statute. Moreover, the words of the proviso restricting the imposition of the death sentence if, prior to the imposition by the Court of the sentence, the kidnaped person has been liberated unharmed, follow the statutory denounced offense of interstate transportation of

a kidnaped person. Under rules of statutory construction the words of the proviso relate to the offense of interstate transportation of already kidnaped persons.

There is nothing in the Act itself presupposing the punishment of persons assaulting persons, even though those same persons may afterwards be the subject of transportation in interstate commerce while kidnaped and held for ransom. The very language of the statute presupposes punishment, up to a maximum of the death penalty, for those kidnapers who, *after* having transported the victim in interstate commerce, do violence to the kidnaped person while being held captive in a State which is foreign to the State in which the victim is seized, for there could, of course, be no interstate transportation unless the victim were taken from one State to another.

If that contention be logical, and petitioner vigorously asserts that it is, then no matter what the proof might show with respect to the nature, degree or extent of injuries inflicted prior to the transportation in interstate commerce, or with respect either to what length of time the victim may have suffered from such previously inflicted injuries, the death penalty would not be applicable.

It is a rule of universal application that it is the statute, not the accusation under it in an indictment or proof in support of the accusation, that prescribes the rule to govern conduct and warn against transgression. *Stromberg* v. *California*, 283 U. S. 359. The statute under consideration, as before stated, does not denounce harming a person prior to the completed act of transportation in interstate commerce. Interstate transportation is defined by Section 408b of Title 18, U. S. C. A., to be the transportation from one State to another. Section 408a of that same title denounces transportation in such commerce of any person

"WHO SHALL HAVE BEEN UNLAWULLY * * * KIDNAPED * * * AND HELD FOR RANSOM," plainly indicating an intention to punish those who TRANSPORT persons who shall have already been kidnaped. The statute does not come into play or denounce any act antecedent to the very act of transportation in interstate commerce. By no stretch of imagination or statutory construction may it be said to embrace any act which precedes the act of such transportation. Applying that logical deduction to the instant case, it is beyond dispute that the death sentence was given this petitioner for acts of assault which it was claimed by the Government were made before the transportation denounced by the statute was ever even commenced, much less completed.

Another rule of general application is that the crime and the elements constituting it must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course of conduct it is unlawful for him to pursue. As said in *Connally* v. *General Construction Company*, 269 U. S. 385, 46 S. Ct. 126, a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *Lanzetta* v. *State of New Jersey*, 306 U. S. 451, 59 S. Ct. 618, is of like effect.

And those same cases, and others which are referred to in them, hold that penal statutes prohibiting the doing of certain things and providing a punishment for their violation should not admit of such a double meaning that citizens may act upon the one conception of their requirements and the courts upon another. Petitioner has asserted, and now most vigorously asserts, that the Act in question is void for uncertainty, and that because of which the indict-

ment, trial, conviction and his sentence were each and all illegal and void.

However, if this Court should be unwilling to go so far and refuse to declare the Act unconstitutional, then petitioner asserts, because penal statutes are to and must be strictly construed, that the language of the present Act is not susceptible of any fair interpretation that would include within its scope or application any act which preceded the abstractly denounced crime of interstate transportation of an already kidnaped person. To hold otherwise would be to ignore all established rules of statutory construction. It follows as a logical conclusion that the death penalty which thus has been inflicted upon petitioner because of some claimed pre-transportation-inflicted injuries was, and is, illegal and should be set aside and this case reversed.

The Nature and Degree of Injury Inflicted.

Having demonstrated that injuries preceding transportation must be excluded from the scope and operation of the Act, the remaining question is whether or not the death penalty was intended to be, and may be, inflicted regardless of the degree of injury visited upon the person of the victim.

It has already been pointed out by petitioner in his brief that Congress intended to induce the kidnaper not to kill or permanently injure the victim by withholding the death penalty if the kidnaper would but refrain from action leading to death, to permanent captivity or to permanent injury (*Parker* v. *U. S.*, 19 F. S. 451). That inducement would be nullified entirely by imposing the death penalty in those cases where injuries, though inflicted, were not

alleged and proven to be permanent ones. It is a firmly established rule that failure of allegation is as fatal as the failure of proof, and that the Government will not be allowed to supplement an otherwise imperfect indictment or supplement a defective charge in the indictment by sufficient proof. Furthermore, that in an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute unless those words, of themselves, fully, directly and expressly, and without uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. See in this connection the foundation cases of *U. S.* v. *Cruikshank*, 92 U. S. 542; *U. S.* v. *Carll*, 105 U. S. 611; and that the burden of proving each essential element of the offense is placed upon the prosecution and a failure on the part of the Government to so prove any one of the necessary facts in the commission of the alleged offense is fatal to the prosecution. *McAfee* v. *U. S.*, 105 F. 2d 21 (~~opinion by Judge Rutledge~~).

With those precepts in mind, the question is: Just how do they affect this case. They directly affect this case because the indictment, somewhat in the language of the statute, NOWHERE alleges that the injuries inflicted were permanent. While it alleges that they were inflicted while the victim was in the custody of the petitioner, and others, it fails miserably to allege whether such injuries were inflicted PRIOR to transportation or AFTER the transportation in interstate commerce of a person who had *already* been kidnaped had been completed. The distinction is vitally important. The indictment is fatally defective for that reason.

Also, there was no proof that at the time the victim was released she was suffering from any injuries which had been previously inflicted by petitioner. The assump-

tion prevails that they could have been caused by accident occurring to the victim irrespective of any ill-treatment at the hands of petitioner. There was a total failure to connect up the condition related at time of release to any act of petitioner. There was absolutely no proof that the injuries claimed to have been inflicted were permanent, laying aside for the moment the important distinction to be drawn that the time of infliction is of paramount and controlling importance. And there was a total absence of any proof that at the time the Court imposed sentence the victim was then in a harmed or impaired condition, the presumption overwhelmingly prevailing, in the absence of proof on the question, that the victim was cured and wholly sound physically. Such failure of necessary proof is fatal to the prosecution of this petitioner and demands reversal.

Also, there is directly involved here the question of whether the death penalty is to be inflicted regardless of the degree of such injuries which may have been inflicted, putting aside once more the all-important question of when the injuries were visited upon the person kidnaped. The statute which makes use of the terms "unharmed" and "liberated unharmed" is a new penal statute, and, although Congress saw fit to devote the whole of Section 408b of Title 18 U. S. C. A. to the definition of the term "interstate commerce," a well-known term, for some unexplainable reason did not utilize one single word in the Act to define the term "unharmed." "Bouvier's Law Dictionary," West Publishing Company's "Words and Phrases," and Webster's "New International Dictionary" are of no assistance. There appears to be no definition of the term. Consequently this is a case where the word in question has no well defined meaning, for it is not listed or catalogued in dictionaries or other works where it would be expected

such a definition would be found. The question then is: Is petitioner to die because of a statutory term for which there is no definition or meaning?

What might to one man or to a court mean "harmed" or "unharmed" or "did not liberate said person unharmed" might to another set of persons or to other courts have an entirely different meaning. There is no standard or guide by which to ascertain the intention of the Legislature. The terms are generic ones. The terms and the statute making use of the terms are devoid of specifications of what constitutes a "liberation unharmed." It is difficult to understand just what the Legislature meant by the words it chose to incorporate in the statutory amendment proviso. It is a debatable question whether or not Congress intended that a simple pin-scratch wound upon the body would amount to "harm." That would be a harm, though an insignificant harming, but nevertheless harm. Any degree of injury inflicted or any mark made upon the body might be said to be "harm" and amount to a harmed condition. Would such come within the category of "harm"? Or did the statute intend that more serious, aggravated, permanent injuries should spell the difference between the imposition of the death penalty or the withholding of it? As a matter of actual fact, the statute is silent as to whether it was intended that bodily or mental injuries should constitute a "harmed" condition.

The fact that confusion arises from the attempt to interpret or understand the words used makes the statute repugnant to the Constitution.

If Congress intended, as it undoubtedly did, to hold out an inducement to the kidnaper by withholding the death penalty if he would refrain from action leading to death, permanent captivity or permanent maiming of the victim,

the inducement would be wholly and completely nullified by imposing the death penalty in those cases where only slight injuries were imposed upon the victim. It may not be remiss to here assert that it is very probable that, once kidnapers became aware that they would be subject to having the death penalty imposed upon them if but slight injuries should be inflicted upon the victim, and regardless of the degree or severity thereof, there would be no incentive for them to either refrain from severely beating or torturing the victim or even killing him; for, if regardless of the degree of injury inflicted, the death penalty would nevertheless be applicable and be imposed, the jury so recommending, the kidnaper would be placed in a more advantageous position, so far as the likelihood of being caught and convicted is concerned, by killing the victim and hiding the body, at least to the extent of not having to be confronted by a live, talking, prosecuting victim in court upon the trial. In such a situation the old saying of "Dead men tell no tales" would be peculiarly applicable. That result would be the very opposite to what Congress intended, and the Congressional inducement would entirely lose its force and appeal.

Congress, having intended to make an attractive inducement to the kidnaper, certainly did not intend that whatever in the way of inducement it held out to the kidnaper should be negatived by having the death penalty inflicted on the kidnaper in those cases where only some slight injury could be shown to have been done the kidnaped person. If it be contended that the legislative intent was not to put to death those kidnapers who had but slightly injured their victim, nor those whose victims had recovered, what, then, was the legislative intent? The answer is not to be found in any of the words used in the langauge of the

statute, for there is no standard fixed nor any yardstick by which to measure when a victim will be considered as having been harmed or as having been released unharmed within the meaning and intent of the Act. The Legislature could have very easily defined the terms in the same manner as it saw fit to do with the term "interstate commerce." The fact that it did not strengthens the contention of appellant that the statute is ambiguous and void for uncertainty. Petitioner asserts the Act is unconstitutional for want of certainty, and that it is violative of the due process of law clause, and that his trial and conviction under such an Act is, and was, illegal to the extent demanding a reversal of this case.

If, however, this Court should be unwilling to declare the Act unconstitutional, then it devolves upon the Court to interpret the Act and ascertain the intention of Congress. It is the most earnest contention of the petitioner that it was the intention of Congress to withhold the death penalty from those kidnapers in cases where it is not alleged and proven beyond reasonable doubt that the action of the kidnaper resulted in death, permanent captivity or permanent injury, and that if at the time the Court imposes sentence the victim is then alive and cured or there is an absence of any proof that a contrary condition exists, a cure will then be presumed and that in neither of which events would it be within the power of the jury to recommend, or for the Court to impose, the death penalty.

CONCLUSION.

From what has been said in petitioner's previous brief and in this supplemental brief, the conclusion is inescapable that petitioner has been illegally convicted and condemned to die, and that this case should be reversed.

This Court is most earnestly beseeched to give to this case and to these arguments its serious consideration and to grant to petitioner the relief prayed for in his petition for writ of certiorari, heretofore filed.

Respectfully submitted,

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